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## Contracts—*Smith v. Ford Motor Company: Limitation on a Franchisor's Right To Interfere with Contracts Between a Franchisee and an Employee*

The franchise<sup>1</sup> is an odd legal animal: the product of immense economic power and technical knowledge on one side and entrepreneurial desire and investment ability on the other.<sup>2</sup> As a result a franchisor has a great deal of power over a franchisee's operations.<sup>3</sup> However, the North Carolina Supreme Court in *Smith v. Ford Motor Co.*<sup>4</sup> held that there were limits to the power that a franchisor, Ford, could exert over its franchisee, Cloverdale Ford, under a claim by Ford of legal right to interfere with a contract between a franchisee and an employee. Essentially, Ford could not procure the termination of Cloverdale's general manager without good cause.

The claim of legal right has long been a sufficient defense in North Carolina to claims of tortious inducement of breach of contract.<sup>5</sup> *Smith v. Ford Motor Co.* signifies an important encouragement to claims of tortious inducement by marking a departure from automatic dismissal when a defense of legal right is entered and by increasing judicial inquiry into the merits of such a defense.

In *Smith* Ford Motor Company had a terminable at will franchise

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1. Attempts to define "franchising" have not resulted in a consensus. See, e.g., Fels, *Franchising: Legal Problems and the Business Framework of Reference—An Overview*, in THE FRANCHISING SOURCEBOOK 3-9 (J. McCord ed. 1970); McGuire, *The Labor Law Aspects of Franchising*, 13 B.C. IND. & COM. L. REV. 215 n.1 (1971) [hereinafter cited as McGuire].

2. The imbalance is fostered by the fact that the franchisee alone has made the necessary capital investment; the franchisor has "nothing to lose." See Brown, *Franchising: Fraud, Concealment and Full Disclosure*, 33 OHIO ST. L.J. 517, 518-19 & n.13 (1972) [hereinafter cited as *Franchising*]. For a full discussion of automobile dealer franchises, see Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957) [hereinafter cited as Kessler].

3. Dealer vulnerability in this situation has been traced to the comparatively weak bargaining power and the "anomalous legal classification of the manufacturer-dealer relationship." Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 467-68. It is reinforced by policies such as those exposed in H. BROWN, *FRANCHISING, TRAP FOR THE TRUSTING* (1972). "The second largest auto factory guarantees the result of all conferences between its highly trained executives and the individual dealer by barring any talk whatsoever if the dealer appears with his attorney." *Franchising*, *supra* note 2, at 546.

4. 289 N.C. 71, 221 S.E.2d 282 (1976).

5. See, e.g., *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971); *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964). See generally note 24 *infra*.

agreement with a reconstituted dealership known as Cloverdale Ford.<sup>6</sup> The previously failing franchise had become profitable since the employment of a new general manager, Jack Smith. Cloverdale Ford, the franchisee corporation, employed Smith as president and general manager under a contract terminable at will by Cloverdale. Additionally, the Smith-Cloverdale contract permitted termination for cause if, in the opinion of Ford Motor Company, Smith proved unsatisfactory "from the standpoint of profits earned or the manner of operation of the corporation."<sup>7</sup> Subsequently, Smith became active in the Ford Dealer Alliance, an association of dealers interested in protecting their position in factory-dealer transactions. Upon Ford's request Smith disaffiliated Cloverdale Ford from the Alliance, but refused to end his personal association with the organization. Ford exerted pressure on Cloverdale, apparently threatening termination of the franchise. Cloverdale responded by utilizing the at will clause in Smith's contract, terminating his employment.

Smith instituted suit against Cloverdale Ford, its majority stockholders and Ford Motor Company. The court of appeals approved the superior court's dismissal for failure to state a claim.<sup>8</sup> The North Carolina Supreme Court affirmed the dismissal of claims against Cloverdale Ford<sup>9</sup> and its majority stockholders<sup>10</sup> but held that the allegations were sufficient to state a claim against Ford Motor Company for tortious inducement of breach of contract, despite Ford's assertion of a right to interfere.<sup>11</sup>

Liability for inducing breach of contract is founded in Roman law in a master's action for the indirect injury done to him when his slave was injured.<sup>12</sup> The common law counterpart was an action in trespass

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6. See § 17.(f) of the franchise agreement, 289 N.C. at 79, 221 S.E.2d at 287.

7. *Id.* at 82, 221 S.E.2d at 289.

8. 26 N.C. App. 181, 215 S.E.2d 376 (1975).

9. The dismissal was founded on the right of an employer to terminate an employee whose contract allows for termination at will. This "blindness" attitude toward the exercise of a termination right is also exhibited in cases of franchise termination. "[S]uch right to terminate was not subject to question . . . because of motive, intent or resultant detriment . . . . It is beyond the power of the judiciary to engraft conditions upon the exercise of such a contractual right." *Martin v. Ford Motor Co.*, 93 F. Supp. 920, 921 (E.D. Mich. 1950).

10. There has been discussion of piercing the corporate veil and holding corporate officers and stockholders liable for any wrongful action. Avins, *Liability for Inducing a Corporation to Breach Its Contract*, 43 CORNELL L.Q. 55, 55-58 (1957).

11. 289 N.C. at 76, 221 S.E.2d at 285.

12. See Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728 (1928) [hereinafter cited as Carpenter]; Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 633 (1923) [hereinafter cited as Sayre]; Comment, *Inducing Breach of*

for the loss of the services of a servant.<sup>13</sup> In 1853, the scope of liability was emancipated from the master-servant limitation in *Lumley v. Gye*,<sup>14</sup> which marked the emergence of liability for tortious inducement of breach of contract.

The principle of liability for tortious inducement of breach of contract was first recognized in North Carolina in 1874 in *Haskins v. Royster*<sup>15</sup> when the court imposed liability for inducing a servant to leave his master. The principle was extended in *Jones v. Stanley*<sup>16</sup> when the theory in *Haskins* was extended to cover "every case where one person maliciously persuades another to break *any* contract with a third person. It is not confined to contracts for service."<sup>17</sup>

In 1939 the Restatement of Torts defined one who would be liable for tortious inducement of breach of contract as "one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another . . . ."<sup>18</sup> Comment *e* provides that "the actor must have knowledge of the business expectancy with which he is interfering."<sup>19</sup> But it was not until *Childress v.*

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*Contract: Herein of Contracts Terminable at Will*, 56 NW. U.L. REV. 391 (1961) [hereinafter cited as *Inducing Breach*].

13. See *Inducing Breach*, *supra* note 12, at 391.

14. 118 Eng. Rep. 749 (Q.B. 1853). The court recognized that the employee was not a servant but liability was extended for inducement to breach any employment contract, despite a lack of statutory support. See Sayre, *supra* note 12, at 667-68.

15. 70 N.C. 601 (1874).

16. 76 N.C. 355 (1877).

17. *Id.* at 356 (emphasis in original). This extension to non-employment contracts antedates the English extension by sixteen years. See *Inducing Breach*, *supra* note 12, at 393-94. The principle of liability for inducement of breach of contract did not meet with continued receptivity. In *Swain v. Johnson*, 151 N.C. 91, 65 S.E. 619 (1909), the North Carolina Supreme Court repudiated *Jones* and limited *Haskins* to its facts; liability for inducing breach was limited to the master-servant relationship and to situations in which the means of procurement were tortious in themselves. Subsequent cases either accepted the limitation of *Haskins*, as in *Minton v. Early*, 183 N.C. 199, 111 S.E. 347 (1922), or avoided the discredited principle and relied on doctrines such as unfair trade practices, as in *Smith v. Morganton Ice Co.*, 159 N.C. 151, 74 S.E. 961 (1912). The discreditation was furthered in *Gibson Land Auction Co. v. Brittain*, 182 N.C. 676, 110 S.E. 82 (1921), in which the court said, "In all events, if the plaintiffs be entitled to recover, they must recover in an action growing out of contract; and none has been shown *with the defendant*." *Id.* at 677, 110 S.E. at 83 (emphasis added). This dictum indicates a confusion between liability for breach of contract and liability for inducement of breach of contract.

18. RESTATEMENT OF TORTS § 766(1) (1939). The 1969 tentative draft alters the definition to "[o]ne who intentionally induces or otherwise intentionally causes a third person not to perform a contract with another, other than a contract to marry . . . ." RESTATEMENT (SECOND) OF TORTS § 766 (Tent. Draft No. 14, 1969).

19. RESTATEMENT OF TORTS § 766, comment *e* at 56 (1939).

*Abeles*<sup>20</sup> in 1954 that the North Carolina Supreme Court clearly enunciated the essential elements of the tort in this state: (1) a valid contract must exist between plaintiff and a third party;<sup>21</sup> (2) defendant must know that the contract existed;<sup>22</sup> (3) defendant must intentionally induce the third party to breach;<sup>23</sup> (4) defendant must act without justification;<sup>24</sup> and (5) the breach must cause plaintiff actual damages.<sup>25</sup>

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20. 240 N.C. 667, 84 S.E.2d 176 (1954).

21. 240 N.C. at 674, 84 S.E.2d at 181. The requirement of a valid contract was at issue in *Henry v. Shore*, 18 N.C. App. 463, 197 S.E.2d 270 (1973). An action for inducement of breach of contract was barred because the oral contract for the transfer of real estate was in violation of the Statute of Frauds. In *Burns v. McFarland*, 146 N.C. 382, 59 S.E. 1011 (1907), plaintiff's apparent abandonment of the contract estopped an action based on inducement of breach of a valid contract. The recognition of the tort of interference with prospective economic advantage in *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 140 S.E.2d 3 (1965), alleviated the necessity of proving a contractual relationship in some cases. The tortious conduct interfered with a relational interest. See generally *Green, Relational Interests*, 29 ILL. L. REV. 460, 1041 (1934). That relation can be contractual or pre-contractual. "Where the interference is with a contract, the privileges to interfere are somewhat more limited than in the case of interference with prospective dealings . . ." RESTATEMENT (SECOND) OF TORTS § 766, comment b at 37 (Tent. Draft No. 14, 1969).

22. 240 N.C. at 674, 84 S.E.2d at 181. Notice and intent are linked. See *Harper, Interference with Contractual Relations*, 47 NW. U.L. REV. 873, 880-81 (1953). In *Morgan v. Smith*, 77 N.C. 37 (1877), the court did not impose liability on a defendant who hired plaintiff's employees because the requisite elements of notice and malicious intent had not been proven. The exigency of defendant's notice of plaintiff's contract is amply illustrated by the North Carolina court's response to the land and timber sales cases: *Bruton v. Smith*, 225 N.C. 584, 36 S.E.2d 9 (1945), in which the contract to sell was not duly registered; *Winston v. Williams & McKeithan Lumber Co.*, 227 N.C. 339, 42 S.E.2d 218 (1947), in which the contract to sell was registered; *Eller v. Arnold*, 230 N.C. 418, 53 S.E.2d 266 (1949), in which the realtor's exclusive right to sell was not registered; and *Dulin v. Williams*, 239 N.C. 33, 79 S.E.2d 213 (1953), in which a timber deed was not registered. The court held in each case that only inducement of breach of the registered contract was actionable. Registration was held to be equivalent to legal notice.

23. 240 N.C. at 674, 84 S.E.2d at 181. The necessity of proving intentional inducement is vital; North Carolina rejected negligent inducement of breach of contract in *Thompson v. Seaboard Air Line Ry.*, 165 N.C. 377, 81 S.E. 315 (1914). The element of intent once required proof of malice as well. That requirement was altered by *Coleman v. Whisnant*, 225 N.C. 494, 35 S.E.2d 647 (1945), in which the court refined the definition of malice when it said, "The word 'malicious' used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiff or gaining some advantage at his expense." *Id.* at 506, 35 S.E.2d at 656. See also *McElwee v. Blackwell*, 94 N.C. 261 (1886).

24. 240 N.C. at 674, 84 S.E.2d at 181. Various grounds justify actions that would otherwise create liability for inducement of breach of contract. Business competition and absolute right are acceptable justifications when the defendant is furthering his own interests. Protection of public health, morals and safety; disinterested advice; performance of duty; discipline and responsibility for the welfare of another; protection of character or reputation; interference with marriage contracts; interference with racial disputes; and interference prompted by patriotism are justifications when the defendant is furthering interests other than his own. For a discussion of justification see *Carpenter, supra* note 12, at 745-62; Note, *Torts: Inducing Breach of Contract: Justifications*, 27 CORNELL L. REV. 139 (1941). See also RESTATEMENT (SECOND) OF TORTS § 767 (Tent.

Draft No. 14, 1969), dealing with factors that determine privilege. In the business competition context, the interest of the actor or inducer is measured against the interest of the plaintiff in the contract in order to determine whether the actor has been justified. "If the act is done only for the protection of one of the actor's interests, it must be an interest of a value greater than, or at least equal to, that of the interest invaded, or if the interests are similar, the harm which the act is appropriate to prevent must be substantially equal to or greater than that which it is intended or likely to cause." Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Property and Personality*, 39 HARV. L. REV. 307, 314 (1926). See also Note, *Interference with Contracts at Will—A Problem of Public Policy*, 25 BROOKLYN L. REV. 73, 77-78 (1958). The justification of lawful competition as a successful defense to liability for inducement of breach of contract was introduced in *Holder v. Atlantic Joint-Stock Land Bank*, 208 N.C. 38, 178 S.E. 861 (1935). The justification was held to create an absolute right to interfere, however malicious the motive. The competition did, however, have to be lawful, which was not the case in *Sineath v. Katzis*, 218 N.C. 740, 12 S.E.2d 671 (1941), when defendant was held liable for inducing the former owner of a laundry to breach his noncompetition covenant with the present owner. The privilege of competition was sharply cut back in *Bryant v. Barber*, 237 N.C. 480, 483, 75 S.E.2d 410, 412 (1953), which held that the privilege did not justify interference with existing contractual relationships. "If contracts otherwise binding are not secure from wrongful interference by competitors, they offer little certainty in business relations, and it is security from competition that often gives them value." *Carolina Overall Corp. v. East Carolina Linen Supply, Inc.*, 8 N.C. App. 528, 531, 174 S.E.2d 659, 661 (1970). This protection of existing contracts, which is the law today, was approved in *Moye v. Eure*, 21 N.C. App. 261, 204 S.E.2d 221, cert. denied, 285 N.C. 590, 205 S.E.2d 723 (1974). See also Sayre, *supra* note 12, at 686.

In the case of a business competition defense, defendant's freedom to compete and the societal interest in a competitive economic atmosphere are considered *more* important than any prospective economic advantage to plaintiff, but *less* important than the protection of existing contracts. It was implicit in the holding in *Holder v. Cannon Mfg. Co.*, 138 N.C. 308, 50 S.E. 681 (1905), that an employment contract at will did not create a protectible right at all. The treatment of terminable at will contracts has changed since *Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954).

The most common justification in North Carolina case law is the defense of acting under legal right. The defense of legal right or absolute right is a complete defense, whereas the defense of competition is a qualified privilege exercisable only under certain conditions. See generally Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894). Insulation from liability resulted in *Biggers v. Matthews*, 147 N.C. 299, 61 S.E. 55 (1908), when the court issued the following broad dictum about an absolute right to interfere: "If a person does that which he has a legal right to do, violating no legal duty or obligation, the motive which prompts him is immaterial." *Id.* at 302, 61 S.E. at 57. The tentative draft of the second Restatement indicates a different attitude. Although "[i]f will on the part of the actor toward the person harmed is not an essential condition of liability . . . [t]he presence or absence of ill will . . . may clarify the purposes of the actor's conduct and may be, accordingly, an important factor in determining the existence or non-existence of privilege." RESTATEMENT (SECOND) OF TORTS § 766, comment r at 48-49 (Tent. Draft No. 14, 1969). See also note 23 *supra*. *Biggers'* dictum was followed in *Bell v. Danzer*, 187 N.C. 224, 121 S.E. 448 (1924), then in *Elvington v. Waccamaw Shingle Co.*, 191 N.C. 515, 132 S.E. 274 (1926), and was extended in *Beane v. Weiman Co.*, 5 N.C. App. 279, 168 S.E.2d 233 (1969), when an employee was found to have a legitimate right to announce that his continued employment was conditioned on the firing of another employee of whose activities he did not approve. "Insider" status, which was invoked by the Ford Motor Company in *Smith v. Ford Motor Co.*, is apparently a legal right acquired through a contractual or fiduciary relationship.

25. 240 N.C. at 674, 84 S.E.2d at 182. There is a controversy in many jurisdictions over the appropriate measure of damages. See generally Comment, *Plaintiff's*

The dispute in *Smith v. Ford Motor Co.*<sup>26</sup> revolved around the acceptability of Ford's justification for interference: Ford's status as an "insider" to Smith's employment contract with Cloverdale. The terms "outsider" and "nonoutsider" were introduced in *Childress v. Abeles*,<sup>27</sup> were never defined, but were applied nonetheless by the courts of North Carolina in various situations.

*Wilson v. McClenny*<sup>28</sup> gave the court an opportunity to invoke the immunity of "insiders" from liability for inducement of breach of contract; stockholders and directors were held privileged to cause the corporation to breach its contract with plaintiff. However, the court did qualify the privilege in dictum: "As either directors or stockholders, they were privileged [per written agreement] purposely to cause the corporation not to renew plaintiff's contract as president if, in securing this action, they did not employ any improper means and if they acted in good faith to protect the interests of the corporation."<sup>29</sup>

The court of appeals in *Sawyer v. Sawyer*<sup>30</sup> suggested that had the complaint sufficiently stated the elements of the tort, the stepmother who had advised her stepdaughter and son-in-law to breach the terms of a consent judgment would have been liable. The court determined that the stepmother was an "outsider" as to her son-in-law even though the plaintiff had conceded that she "was an interested party to the performance of such consent judgment and a valuable consideration passed to her, namely, the relinquishing by the present plaintiffs of their efforts to set aside certain conveyances to the stepmother, defendant."<sup>31</sup>

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*Measure of Recovery for Tortious Inducement of Breach of Contract—Profits or Losses?*, 19 HASTINGS L.J. 1119 (1968); Note, *Interference with Contractual Relations: A Common Measure of Damages*, 7 SANTA CLARA LAW. 140 (1966). In *McElwee v. Blackwell*, 94 N.C. 261 (1886), the court insisted upon actual damages before recovery could be allowed. For that reason a new contract or novation is a bar to an action for inducement of breach of the original contract according to the court in *Fowler v. Nationwide Ins. Co.*, 256 N.C. 555, 124 S.E.2d 520 (1962).

26. 289 N.C. 71, 221 S.E.2d 282 (1976). The tentative draft of the second Restatement extends a defense of privilege to "[o]ne who has a financial interest in the business of another . . . if the actor (a) does not employ improper means, and (b) acts to protect his interest from being prejudiced by the contract or relation." RESTATEMENT (SECOND) OF TORTS § 769 (Tent. Draft No. 14, 1969). Comment *a* defines that requisite business interest as an "interest in the nature of an investment. A part owner of the business, as for example, a partner or stockholder, has at least such an interest. But a bondholder or other creditor may also have it." *Id.*, comment *a*, at 75-76.

27. 240 N.C. 667, 84 S.E.2d 176 (1954). "[A]n action in tort lies against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party." *Id.* at 674, 84 S.E.2d at 181.

28. 262 N.C. 121, 136 S.E.2d 569 (1964).

29. *Id.* at 133, 136 S.E.2d at 578.

30. 4 N.C. App. 594, 167 S.E.2d 471 (1969).

31. *Id.* at 599, 167 S.E.2d at 475.

The boundaries of the "insider"- "outsider" distinction are vital since an "insider" has a privilege to induce breach of a contract to which he is not a party, so long as he has a recognized interest.<sup>32</sup> In *Kelly v. International Harvester Co.*<sup>33</sup> the franchisor, Harvester, was held to be an "insider" to the employment contract of plaintiff as general manager for the franchisee corporation. The franchisor's "insider" status was apparently the result of several conclusions: that Harvester had a "legal right under the common law to protect and promote its own interests in the conduct and success of [the franchisee's] business;"<sup>34</sup> that according to the franchise contract Harvester had the right to terminate the franchise if "there is any change in the principal officers, directors, management, or stock ownership which in the opinion of the Company will effect a substantial change in the operation, management or control of the dealership"<sup>35</sup> and that such a change had occurred when plaintiff had been hired by the franchisee as general manager without Harvester's approval; that the franchise agreement giving Harvester these rights antedated the employment contract; that Harvester could reasonably believe that the employment of plaintiff as general manager of this dealership would pull trade from a Harvester dealership in plaintiff's hometown nearby; and that Harvester was acting in good faith in attempting to relocate plaintiff in a similar position elsewhere in the state.

The language of *Kelly v. International Harvester Co.* was malleable enough to allow the court in *Smith v. Ford Motor Co.* to find the claim sufficient or insufficient and still employ *Harvester's* language. The court in *Smith* chose to read the *Harvester* result as mandated by the cumulative effect of the conclusions above. International Harvester was held to be an "insider" not simply because it was the franchisor but because its actions were justified under the contract and were not suspect as to intent. Although Ford Motor Company might have had a "legal right . . . to protect and promote its own interest in the con-

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32. An "insider" has some of the same characteristics as "one who has a financial interest" in Restatement language. See note 26 *supra*. "One who has a financial interest" is privileged to act to protect his interest unless he employs improper means. If proving "improper means" requires proof that the defendant acted in a manner that would be tortious, the qualification is meaningless since liability would exist independent of tortious inducement of breach of contract. The exact definition of "insider" is illusory, but it seems to require more than a third party beneficiary relationship.

33. 278 N.C. 153, 179 S.E.2d 396 (1971).

34. *Id.* at 165, 179 S.E.2d at 402.

35. *Id.* at 164, 179 S.E.2d at 402.



duct and success of [the franchisee's] business,"<sup>36</sup> the result in *Smith* indicates that this right alone is not now sufficient under North Carolina law to create an absolute right to interfere. The interference must be for a specific and lawful purpose.

Ford Motor Company's rights under the contract<sup>37</sup> were restricted or qualified in the same manner as International Harvester's.<sup>38</sup> By the language of Smith's employment contract with Cloverdale, Ford could request the termination of Smith's employment only if he proved unsatisfactory "from the standpoint of profits earned or the manner of operation of the Corporation."<sup>39</sup> The court in *Smith* pointed out that the expressed qualification "clearly indicates that dissatisfaction for the stated reasons was intended by the parties to be the *only* justification"<sup>40</sup> for Ford's interference. In *Harvester* there was a change in management that triggered Harvester's absolute right to interfere. In *Smith* plaintiff was not only satisfactory from the standpoint of profits and operation, he was exemplary, reversing the dealership from a losing franchise into a profitable one.

The court in *Harvester* concluded that because the franchise agreement antedated the employment contract, parts of the agreement that referred to operational policy and resulting franchisor rights were incorporated into plaintiff's employment contract.<sup>41</sup> The issue of incorporation of Cloverdale's franchise agreement into Smith's employment contract was not raised in *Smith* because the franchise agreement did not antedate the employment contract.<sup>42</sup> However, if the *Harvester* conclusion is extended, certain language in the franchise contract could have borne on Ford's defense. The franchise agreement term that Ford "solicits dealers to bring to its attention through their National

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36. *Id.* at 165, 179 S.E.2d at 402.

37. The Lanham Act, 15 U.S.C. §§ 1051 *et seq.* (1970), which imposes upon Ford an affirmative duty to police the use of its trademark, may consequently give Ford a right to interfere that is not based upon contract. But since quality control and uniform use of the trademark are the apparent goals of the provision, Ford should not be able to justify interference with an efficient, productive operation.

38. Ford claimed an absolute right to interfere because of its status as an "insider." Justice Holmes' caveat regarding absolute rights is interesting in light of Ford's claim: "[T]he word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified." *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350, 358 (1921). An examination of the premise of Ford's right reveals it to be a qualified right.

39. 289 N.C. at 82, 221 S.E.2d at 289 (emphasis omitted).

40. *Id.* at 85, 221 S.E.2d at 291.

41. 278 N.C. at 165, 179 S.E.2d at 402.

42. 289 N.C. at 76, 221 S.E.2d at 285-86.

Dealer Council organization any mutual dealer problems or complaints as they arise"<sup>43</sup> raised the obligation of Smith to utilize that forum rather than the Ford Dealer Alliance. However, the use of the word "solicits" and the "absence of any firm commitment on the part of Ford to abide by the decisions"<sup>44</sup> of the National Dealer Council indicate that the use of the grievance procedure set up by Ford is not, and should not be, mandatory. Furthermore, Smith did disaffiliate the franchisee, Cloverdale, as requested by Ford and maintained only his individual membership in the Ford Dealer Alliance.

Other franchise agreement language allowed termination of the franchise by Ford due to events controlled by the dealer, as in the case of "disagreement between or among any persons named in paragraph F [Smith and co-operator of the dealership and minority stockholder of the franchise, Davis], which in the Company's opinion tends to affect adversely the operation or business of the Dealer . . . ."<sup>45</sup> Even with incorporation, Ford should have been unable to justify its interference with reference to this language. Although Davis would have succeeded to Smith's stock interest upon termination of Smith's employment,<sup>46</sup> Smith did not join Davis as a defendant and no allegation of disagreement between Smith and Davis was made. Furthermore, this right to terminate the franchise was restricted to situations in which Ford reasonably believed the dealership was adversely affected. Such a belief in view of increased profits and operational stability would have been unreasonable.

It is clear that, aside from the disputed lack of justification, Smith alleged a prima facie case of tortious inducement of breach of contract. A valid contract clearly existed and was offered in support of the allegation.<sup>47</sup> Ford did not dispute that it had the requisite knowledge of the existence of Smith's employment contract; plaintiff as president of the corporation, Cloverdale, signed the franchise agreement.<sup>48</sup> Plaintiff alleged that when Ford learned of plaintiff's continued association with the Ford Dealer Alliance, "it 'wrongfully, maliciously, and unlawfully exerted pressure' upon the stockholders and directors of Cloverdale to terminate the plaintiff's employment."<sup>49</sup> The resulting dam-

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43. *Id.* at 76, 221 S.E.2d at 286.

44. Brown, *A Bill of Rights for Auto Dealers*, 12 B.C. IND. & COM. L. REV. 757, 815 (1971) [hereinafter cited as Brown].

45. 289 N.C. at 78, 221 S.E.2d at 286-87.

46. *Id.* at 82, 221 S.E.2d at 289.

47. *Id.* at 75-76, 221 S.E.2d at 285.

48. *Id.* at 77, 221 S.E.2d at 285-86.

49. *Id.* at 74, 221 S.E.2d at 284.

ages were at least the loss of the right to compensation. Except insofar as plaintiff alleged that the interference was "unlawful," there was no allegation that defendant acted without justification. The court apparently has modified *Childress*<sup>50</sup> by completely converting the justification obstacle to an affirmative defense, to be pleaded and proven by the defendant.<sup>51</sup>

The analogy of the Ford Dealer Alliance to early labor unions is difficult to avoid.<sup>52</sup> Ford backs the National Dealer Council as the grievance and bargaining panel in much the same way industrial employers once supported company unions whose allegiances, at best, were split.<sup>53</sup> Those who disagree with the policy are terminated.<sup>54</sup> When "a third party induced an employer to dismiss an employee before the expiration of his contract term of employment because the employee failed to support the cause of union labor[, r]ecovery was permitted."<sup>55</sup> Essentially the same situation occurred in *Smith* when Ford procured the termination of Smith because he supported a collective bargaining unit. Had Ford been allowed to claim the protection of an absolute right of a franchisor to interfere, the prohibition against collective association would be as complete as in the days of "yellowdog" contracts for workers.<sup>56</sup>

50. 240 N.C. 667, 84 S.E.2d 176 (1954). See note 27 *supra*.

51. The plaintiff put forth a prima facie case without alleging lack of justification; the burden of proving justification rests with the defendant. *Berry v. Donovan*, 188 Mass. 353, 74 N.E. 603, *appeal dismissed*, 199 U.S. 612 (1905).

52. For a full discussion of the labor law aspects and implications, see McGuire, note 1 *supra*.

53. Company unions were disallowed under § 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2) (1970). Even company established grievance boards, similar to the Ford Dealer Council, were disallowed. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

54. The practice of terminating dissenters was not new to Ford. During the depression in the 1930's, Ford instituted a controversial growth program:

Fresh dealers were given contracts in droves. Experienced agents who opposed the new policies and spoke their minds frankly were replaced as rapidly as possible. Stressing the importance of weeding out "undesirables," the company reminded branch managers of their wide powers in cancelling franchises.

NEVINS & HILL, *FORD: EXPANSION AND CHALLENGE 1915-1933* (1957), quoted in Macaulay, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System*, 1965 WIS. L. REV. 483, 497 [hereinafter cited as Macaulay].

55. Weyrauch, *Third Parties and the Contract Relationship*, 32 BROOKLYN L. REV. 29, 45 (1951) discussing *Berry v. Donovan*, 188 Mass. 353, 74 N.E. 603, *appeal dismissed*, 199 U.S. 612 (1905). See also *R & W Hat Shop, Inc. v. Sculley*, 98 Conn. 1, 118 A. 55 (1922).

56. A yellowdog contract is an employment contract wherein the employee agrees to refrain from labor union membership and collective activity. An example of such a contract is contained in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917).

The same equities that favored collective bargaining for labor in the past support increased power for franchisees now.<sup>57</sup> One litigator who represents franchisees has suggested collective activity by franchisees as a protective measure against the disparate economic power of franchisors:

Franchisees and their attorneys should meet with other franchisees to ascertain franchisor's activities involving: (a) unfair or deceptive acts or practices; (b) discriminatory practices; (c) price-maintenance policies; (d) territorial, customer or other illegal restrictions; and (e) other conduct that may be illegal under antitrust and other laws.<sup>58</sup>

A franchisor such as Ford Motor Company who disapproves of franchisees' collective activity often has the convincing power of a termination at will clause in the franchise agreement to persuade the franchisee not to participate in groups such as the Alliance.<sup>59</sup>

Until franchisees are accorded the same rights and protections as workers to associate collectively, franchisors can abuse their massive economic power<sup>60</sup> to diffuse any internal opposition.<sup>61</sup> Massachusetts has met the need with the Franchising Fair Dealing Statute, section ten

57. "Through their dominant economic position, the manufacturers have employed the franchise, a 'one-sided document which is neither contract, license or agreement,' to gain maximum control over the management of the dealers' business without corresponding 'legal' responsibility." Kessler, *supra* note 2, at 1138.

58. Hammond, *Litigation Techniques in Representing Franchisees*, in *FRANCHISING: SECOND GENERATION PROBLEMS* 80 (Practising Law Institute 1969).

59. The breadth of termination at will clauses is discussed in Comment, *Franchise Regulation: Ohio Considers Legislation to Protect the Franchisee*, 33 OHIO ST. L.J. 643, 664-72 (1972). Automobile dealers have some protection under the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25 (1970). But, partly because the Act requires the difficult proof of coercion, there have been few successful actions by terminated dealers. Macaulay, *supra* note 54, at 742-43 (Table 2). For the general lack of success under the Act, see *id.* at 741-89.

60. "The dealers are . . . economic dependents of the company whose cars they sell . . . .

. . . . [T]he economic power of Ford over its dealers is so great that dealers who desperately need Ford cars will be helpless to resist Ford's 'influence' and 'persuasion,' whether legalistically called 'coercion' or not." *Ford Motor Co. v. United States*, 335 U.S. 303, 323, 325 (1948) (Black, J., dissenting). The economic resources of the franchisor are also available to prolong litigation, "thereby requiring franchisees to suffer substantial legal fees" which few can afford. H. BROWN, *FRANCHISING, TRAP FOR THE TRUSTING* 95 (1969). "One of the biggest strengths the franchisor has over the franchisee is the . . . franchisee can't sue—it costs too much." Statement of David Slater, President of Mutual Franchise Corp., Boston Globe, Feb. 18, 1970, at 68, cols. 1-8.

61. An injunction against termination of franchises was allowed to stand because the terminations were intended to harass the leaders of class action litigation. *Franchising*, *supra* note 2, at 544 n.105, discussing *In re International House of Pancakes Franchise Litigation*, 331 F. Supp. 556 (Jud. Pan. Mult. Lit. 1971).

of which provides: "Every franchisee shall have the right of free association with other franchisees for any lawful purpose."<sup>62</sup> Washington,<sup>63</sup> Vermont,<sup>64</sup> New Jersey<sup>65</sup> and Pennsylvania<sup>66</sup> also have responded legislatively to the need to equalize the balance of power; however, these statutes usually do not provide effective sanctions.<sup>67</sup> The Washington Franchise Act, for example, "merely invalidates 'yellow-dog' provisions in franchise contracts, [therefore] it accomplishes very little."<sup>68</sup>

Ford Motor Company's hostility toward the Ford Dealer Alliance and toward Smith as a member of the Alliance is the unspoken issue in the case. The presence of malice does not rebut a privilege to procure breach of contract in North Carolina. Although plaintiff had properly alleged the elements of tortious inducement of breach of contract, the lower courts were restrained from imposing liability if Ford interfered under a legal right, regardless of information or intimation about Ford's motives.<sup>69</sup> Invocation of "insider" status in answer to the complaint had been sufficient to establish the legal right and to support a motion to dismiss. Although the different result in *Smith* heralds judicial

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62. MASS. GEN. LAWS ANN. ch. 93B, § 10 (1975). Massachusetts did not enact other provisions that would have provided franchisees with a statutory right to bargain collectively and with procedural protections of the State Labor Relations Act. See text of the proposed Franchise Fair Dealing Act in THE FRANCHISING SOURCEBOOK 211 (J. McCord ed. 1970). For a complete discussion of the proposed Act by its author, see Brown, *supra* note 44.

63. WASH. REV. CODE ANN. § 19.100.180(2)(a) (Supp. 1974).

64. VT. STAT. ANN. tit. 9, § 4080 (Supp. 1975).

65. N.J. STAT. ANN. § 56:10-7(b) (Supp. 1975).

66. The Pennsylvania statute protects dealers of gasoline, petroleum products and motor vehicle accessories. Act No. 126 (Nov. 26, 1975), § 4(1), [1975] 3 Pa. Leg. Serv. 362.

67. "The [Washington] statute does not actually guarantee the right of franchisees to associate for any purpose. If franchisees were organized to bargain collectively with the franchisor or to set retail prices, hours and the like, they could well be in violation of federal antitrust laws." Chisum, *State Regulation of Franchising: The Washington Experience*, 48 WASH. L. REV. 291, 371 (1973) [hereinafter cited as Chisum]. If the National Labor Relations Act was applicable to all franchise relationships, sanctions would exist for franchisor abuse of franchisee rights. For a discussion of the possible applicability, see McGuire, *supra* note 1, at 227-49 and Fels, *Agency Problems*, in BUSINESS AND LEGAL PROBLEMS OF THE FRANCHISE 113-18 (J. McCord & I. Cohen eds. 1968).

68. Chisum, *supra* note 67, at 371.

69. There have been cases in other jurisdictions in which the courts have expressed concern over the means of inducement. *E.g.*, *Connors v. Connolly*, 86 Conn. 641, 86 A. 600 (1913). "[C]ertain bounds must be set to the use of means . . . if a decent regard for the rights of others is to be preserved and the public welfare conserved." *Id.* at 649, 86 A. at 603. See generally Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

recognition of a *qualified* "insider" status, it may be mandated by the judicial response to the injustice of allowing Ford's malicious inhibition of Smith's personal right of association. The tort remedy is inadequate in several ways. It does not adapt easily to the franchise in which the "inducer" has a contractual relationship with the parties. It does not protect a franchisee from "lawful" but malicious interference. Without an element of malice, punitive damages are out of reach. In all, the franchise agreement allows the knowledgeable franchisor an opportunity to contract for an absolute right, and the remedy is insufficient to deter franchisor abuses.

Protective legislation similar to the Massachusetts statute should be enacted in North Carolina.<sup>70</sup> A terminable at will clause in a franchise contract affords the parties an absolute right to terminate. Neither the hardship that the clause works nor its unconscionability is considered because franchise contracts do not seem to provoke the same judicial protectiveness as standardized contracts.<sup>71</sup> Furthermore, there is the possibility of no remedy under North Carolina tort law because the exercise of a legal right cannot result in liability regardless of motive. *Smith v. Ford Motor Co.* allows the franchisee and his employee easier access to a tort remedy but does not prevent Ford and other franchisors from simply increasing their power, their "insider" status, in future franchise agreements. The disparate power the franchise contract puts in the hands of the franchisors must be balanced. Legislative recognition of the rights of franchisees and their employees<sup>72</sup> would protect

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70. Current North Carolina automobile franchise legislation is limited to licensing procedures and termination requirements. See N.C. GEN. STAT. § 20-285 to -308 (1975). Although at least one writer believes that "[e]nforcement of minimum standards of fairness is not such an innovative step that it can be taken only as an overriding matter of public policy or after legislative mandate," Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 468, the pervasiveness of the justification defense in North Carolina, with little attention to "minimum standards of fairness," underlines the need for a statutory remedy to franchisor abuses in this state. Corrective legislation should respond to this inadequacy as well as to other inequities prevalent in franchise relationships. See generally *Student Symposium: The Franchise Relationship—Abuses and Remedies*, 33 OHIO ST. L.J. 641-742 (1972).

71. Gellhorn, *supra* note 70, at 468. A factor which limits judicial intervention is the fact that the complex controls asserted in franchise agreements defy explication by general practitioners and rigid evaluation by most judges. H. BROWN, *FRANCHISING, TRAP FOR THE TRUSTING* 95 (1969).

72. For single distributor franchise arrangements it may not be vital to provide franchisee employees with statutory protections, but in "the larger franchise enterprises, [a] definitional problem usually lies in determining whether the franchisor is unrelated to the franchisee's employees, or whether he is a joint employer of them." McGuire, *supra* note 1, at 230.

North Carolina businessmen who associate themselves with national franchisors and would provide the North Carolina courts with an ascertainable standard by which to scrutinize franchisor abuses.

ELIZABETH ANANIA

### Family Law—Constitutional Right of Privacy: The Father in the Delivery Room

Eleven years ago in *Griswold v. Connecticut*<sup>1</sup> the United States Supreme Court gave full constitutional recognition to a broad and fundamental realm of protected human conduct. This conflux of rights was termed generally by the Court as the right of "privacy."<sup>2</sup> With the source of this newly developed right ambiguously stated and its scope extremely uncertain, lower courts have had little guidance in determining the bounds of its practical application. In the recent case of *Fitzgerald v. Porter Memorial Hospital*<sup>3</sup> Judge John Paul Stevens of the United States Court of Appeals for the Seventh Circuit (now Justice Stevens of the United States Supreme Court) was presented with the problems of determining the breadth of the right to privacy and the limits placed upon it by countervailing societal interests. At stake were the important, if not fundamental, rights of a father, mother and doctor<sup>4</sup> in having the father present in the delivery room at childbirth.<sup>5</sup> The court, unwilling to entangle itself in a medical dispute,<sup>6</sup> held that the parents' interest in having the father present was of insufficient magnitude to invalidate hospital regulations forbidding fathers from entering the delivery room.<sup>7</sup>

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1. 381 U.S. 479 (1965).

2. *Id.* at 484.

3. 523 F.2d 716 (7th Cir. 1975).

4. Plaintiffs argued that the hospital regulations improperly restricted their doctors' rights to practice medicine. Although the trial court found no standing in plaintiffs to assert their doctors' rights, the court of appeals found standing under *Griswold* in which a doctor was allowed to assert his patient's rights. The appellate court ruled that since plaintiffs had no protected rights in themselves they had no greater claim when standing in their doctors' stead. *Id.* at 721-22 & n.23.

5. *Id.* at 717.

6. *Id.* at 721.

7. *Id.*